Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

KARL RAINEY,

Petitioner,

v.

DAVID DI GUGLIELMO,
SUPERINTENDENT,
-and-
DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA,
-and-
ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the federal courts below, in direct and serious conflict with the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply an erroneous, sufficiency-of-the-evidence standard when evaluating the prejudice which resulted from trial counsel's ineffectiveness?

II. Did the Courts below abdicate their responsibility to remedy the Superior Court of Pennsylvania's clearly unreasonable misapplication of *Strickland v. Washington*, 466 U.S. 668 (1984) – as well its clearly erroneous factual determinations which were directly contrary to the evidence of record – in a case in which Petitioner's claim to have acted in self defense was totally emasculated by trial counsel's ineffectiveness?

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Petitioner Karl R[illegible]y respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Third Circuit denying Petitioner's application for a certificate of appealability in this case.

OPINIONS BELOW

The May 18, 2007 order of the United States Court of Appeals for the Third Circuit, of which review is sought, is unreported and is reprinted in the Appendix hereto at pp. 1a-2a.

Neither the September 6, 2007 memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania, John R. Padova, J., nor the January 12, 2006 report and recommendation of United States Magistrate Judge Peter B. Scuderi, have been reported in the Federal Supplement. Both are, however, unofficially reported at 2006 WL 2588747. The District Court's opinion and order are reprinted in the Appendix hereto at pp. 3a-29a. The Magistrate Judge's report and recommendation are reprinted in the Appendix hereto at pp. 30a-43a.

JURISDICTION

The Court of Appeals entered the order denying Petitioner's application for a certificate of appealability on May 18, 2007. No petition for re-hearing was sought. This Court has jurisdiction to review the aforesaid order under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236 (1998).

On August 20, 2007, Justice Souter ordered that the time for filing this petition for writ of certiorari be extended to and including October 15, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 (a), (c)(1)-(2):

> (a) In a habeas corpus proceeding or a proceeding before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> ....
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(a),(d), (e)(1):

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> ....
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

I. Procedural History; Jurisdiction

Petitioner is serving a life sentence for allegedly premeditated, first degree murder, following his 1995 conviction by a jury in the Court of Common Pleas of Philadelphia County, *Commonwealth of Pennsylvania v. Karl Rainey*, No. CP 9412-0717. Petitioner's direct appeal was unsuccessful.[1] Subsequently, Petitioner initiated a proceeding under the Pennsylvania Post Conviction Relief Act which was similarly unsuccessful both in the Court of Common Pleas and on appeal.[2]

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1. *See* memorandum opinion of the Superior Court of Pennsylvania on direct appeal, No. 4275 PHL 1995, January 16, 1997, text unpublished but disposition reported at 698 A.2d 110 (Table) – reprinted in the Appendix hereto at pp. 60a-63a; order of the Supreme Court of Pennsylvania, No. 69 E.D.Alloc.Dkt. 1997, November 3, 1997 (denying petition for allowance of appeal), text unpublished but disposition reported at 550 Pa. 681, 704 A.2d 637 (Table).

2. *See* opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, No. CP 9412-0717, November 17, 2003 (Mazzola, J.) (denying post conviction collateral relief), (Cont'd)

Petitioner then filed a timely petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, invoking jurisdiction under 28 U.S.C. § 2254. The District Court ultimately denied relief and refused to issue a certificate of appealability. Petitioner then applied for a certificate of appealability in the United States Court of Appeals for the Third Circuit, which application was denied on May 18, 2007 "for essentially the reasons discussed by the District Court." Appendix, pp. 1a-2a.

II. Factual Background

A. Eyewitness Testimony

The Commonwealth's theory of the case was that Petitioner and Petitioner alone shot a total of 8 bullets into the decedent Kenneth White and another three into his friend Ervin Boyd. Even though White had five frontal wounds of .380 caliber, and three back wounds of 9 millimeter caliber, the Commonwealth argued that both types of ammunition were fired by Petitioner from a single gun. This argument was based upon the highly

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(Cont'd)

unpublished and unreported – reprinted in the Appendix hereto at pp. 53a-59a; memorandum opinion of the Superior Court of Pennsylvania, No. 2861 EDA 2002, September 9, 2004 (Del Sole, P.J., Panella and Beck, JJ.) (affirming order of the Court of Common Pleas), text unpublished but disposition reported at 863 A.2d 1229 (Table) – reprinted in the Appendix hereto at pp. 44a-52a; order of the Supreme Court of Pennsylvania, No. 499 EAL 2004, February 22, 2005 (denying petition for allowance of appeal), text unpublished but disposition reported at 582 Pa. 673, 868 A.2d 1199 (Table).

speculative testimony of ballistics examiner Lt. Mark Stephan, that it was possible to fire 9 millimeter ammunition from certain cheaply made .380 caliber firearms. *See* N.T. 8/8/95, pp. 78-109. This, along with the circumstance that three of White's eight gunshot wounds were wounds to the back with an upward trajectory, was used by the Cor monwealth to relentlessly argue in favor of premeditation and against Petitioner's self-defense claims. *See, e.g.*, N.T. 8/7/95 pp. 30, 32; 8/9/95, pp. 106-107, 111-116, 119-120.

Petitioner argued, more logically, that although he was indeed responsible for at least two of White's frontal wounds, having shot White while in legitimate fear for his life, he was not responsible for the additional wounds to the back which had been apparently inflicted while White was down on the ground. *See, e.g.*, N.T. 8/9/95, pp. 58-61, 100-102. In other words, Petitioner denied premeditated murder, and argued a version of circumstances that would have amounted, at worst, to voluntary manslaughter under Pennsylvania law.

Testimony showed that the victim, White, had become angry at Petitioner some weeks earlier for complaining about White's mistreatment of Petitioner's son's mother. This dispute ended in a fist fight, after which Petitioner was warned by at least two people that White was known to be dangerous, to often carry a gun, and to be willing to use it. Afraid for his safety, Petitioner purchased a .380 caliber gun, which he had on his person in the early morning hours of November 19, 1994.

At that time, Petitioner was leaving a bar when he encountered White, who was on his way in. White turned

around, exited the bar, and followed Petitioner down the street, calling to him angrily that their former dispute was not over. White and some friends (including the other victim who was injured but not killed, Ervin Boyd) eventually surrounded Petitioner, preventing him from reaching his car. Because of the warnings he had previously received, Petitioner was already in fear for his life – and when White and Boyd both appeared to reach inside their jackets, he drew his gun and shot off several rounds before eventually ducking in between some parked cars. It was at this point, after he had taken cover, that he was shocked to see a friend of his, Kevin Williams, pumping more shots into White's body, despite the fact that he was already down and lying on the ground. N.T. 8/8/95, pp. 50-75, 79, 81-83, 86 (Petitioner's testimony).

At his trial, Petitioner argued that it was Williams who accounted for the 9 millimeter fired cartridge cases found on the street, and the two 9 millimeter bullets found in White's body, both in wounds inflicted from the back. *See, e.g.*, without limitation, N.T. 8/9/95, pp. 23-106. Besides his own testimony to this effect, Petitioner offered character witnesses, N.T. 8/9/95, pp. 3-18, the testimony of Joy King corroborating the original dispute between Petitioner and White, N.T. 8/9/95, pp. 23-32, and the testimony of Kenneth White's own friend, James Stanton, to the effect that it was indeed White who initiated the trouble on the night of the shooting, that Boyd had a reputation for carrying a gun, and that just before Petitioner began to shoot, White and Boyd had Petitioner boxed in so that he was unable to get to his car, while White demanded a fight. N.T. 8/9/95, pp. 35-39, 45-47.

Based on Boyd's account of the incident, however, and the testimony of another witness Kevin White (unrelated to the decedent Ke*nneth* White), the Commonwealth argued that Williams was nothing more than a "phantom," and that the only actual shooter was Petitioner. *See* N.T. 8/9/95, pp. 116-120.

Boyd and the other Commonwealth eyewitness, Kevin White (unrelated to the victim Ke*nneth* White) confirmed Petitioner's and Stanton's testimony that it was White who was pursing Petitioner and insisting upon renewing the argument, while Petitioner attempted to get to his car and leave. *See* N.T. 8/7/95, pp. 90-92, 114-115 (Boyd); 8/8/95, pp. 7-10 (Kevin White). Boyd, however, claimed that Petitioner was the person doing all the shooting – although on cross-examination he admitted that he had not actually been in a position to see the final shots. N.T. 8/7/95, pp. 95-90, 100, 122-124.[3]

Kevin White, a disc jockey who had been working at the bar that night, testified that he heard gunfire while he was outside making a phone call. Turning to look, he saw a man standing and firing a gun in a downward direction. After ducking back into the bar to warn

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3. Boyd also admitted that he had been drinking prior to the incident. N.T. 8/7/95, pp. 110-111. At the time of his testimony, at age 21, he had already been convicted of robberies, forgeries and drug offenses, and was presently incarcerated on some "wanted cards." N.T. 8/7/95, pp. 103-107. Under Pennsylvania law, a witness' general truthfulness may be impeached by reference to previous *crimen falsi* convictions – including convictions for robbery and forgery. *Commonwealth v. Penn*, 497 Pa. 232, 244, 439 A.2d 1154, 1160 (1982); *Commonwealth v. Pilosky*, 362 A.2d 253, 257 (Pa.Super. 1976).

patrons, during which time he heard a couple more shots, White claimed to have returned outside to find the same man standing in the same location, still shooting downward. N.T. 8/8/95, pp. 5, 12-13, 23-25.

In addition to the obvious difficulties of rationalizing this account with the actual bullet wounds – all but three of which had a trajectory consistent with having been inflicted while the decedent was on his feet and moving around – and the unlikelihood that the entire shooting was spread over such a long period of time – Kevin White's testimony was also gravely weakened because the description he gave to the police was not congruent with Petitioner's actual physical characteristics. Indeed, he was unable to actually identify Petitioner as the shooter. His claim, moreover, that one and the same man was shooting both times, was ultimately shown, after cross examination, to have rested on one and only basis – that both shooters, supposedly, wore the same length coat. N.T. 8/8/95, pp. 16, 21-22, 25, 34-36.

B. Crime Scene and Forensic Evidence

Found near the body of Kenneth White were four fired 9 millimeter cartridge casings. Five .380 automatic fired cartridge cases, 3 on the street and 2 on the sidewalk, were found near the streetlight. Also found elsewhere on the street were two live 9 millimeter shells which had not been fired. N.T. 8/7/95, pp. 59, 61-62, 67.

Examination of White's body revealed eight different gunshots – none of which were close-range wounds. N.T. 8/8/95, pp. 113, 127-129. In the order identified by the testifying pathologist, Dr. Stephanie Mills, these were as follows:

1. A frontal wound to the left chest, running rightwards, backwards and downwards to emerge mid-flank on the victim's side, perforating the left kidney. N.T. 8/8/95, pp. 114-115.

2. A frontal wound to the right lower chest, running leftward, forward and downward, and exiting on the medial surface of the right abdomen, causing no major damage to internal organs. N.T. 8/8/95, pp. 116-117.

3. A frontal wound to the side of the right lower abdomen, running leftward and forward and exiting on the lateral surface of the right lower abdomen, causing a small perforation of the small intestine. N.T. 8/8/95, pp. 118-119.

4. A wound **to the upper left back** near the shoulder, running upward and slightly forward, causing no major injury. **A bullet was recovered from this wound.** N.T. 8/8/95, pp. 119-121.

5. A wound **to the lower left back,** rightward and upward, exiting from the shoulder. N.T. 8/8/95, p. 121.

6. A wound to the forearm near the elbow, upward and leftward, probably a defensive wound. N.T. 8/8/95, pp. 121-122.

7. A **penetrating (not perforating) frontal wound** to the left side of the lower chest, leftward, downward and backward, which caused a perforation of the lung, and consequent hemorrhaging. N.T. 8/8/95, p. 123.

8. A **wound to the lower left back**, upward and rightward, which perforated the left lobe of the lung and also caused damage to Mr. White's kidney and extensive bleeding. **A bullet was recovered from the path of this wound.** N.T. 8/8/95, pp. 123-125. Contrary to the Commonwealth's repeated, false and misleading argument to the jury, this bullet, although lodged in the back at the midline, **was the result of a frontal wound.** *See* N.T. 8/8/95, p. 123, lines 12-13. It was also, according to Dr. Mills' testimony, **the wound most seriously contributing to Mr. White's death.** N.T. 8/8/95, pp. 123-125.

Thus, despite the fact that the formal, overall cause of death was given as "multiple gunshot wounds to the chest and the abdomen and the back" – N.T. 8/8/95, pp. 73, 127 – it is clear that Dr. Mills specifically identified *one of the wounds to the back* as having most seriously contributed to Kenneth White's death.

As was vigorously argued by the attorney for the Commonwealth, the three gunshots entering the back had an upward and rightward trajectory, suggesting that the victim may have been shot from above and behind while he was stationary and down on the ground, whereas the wounds entering from the front were downward and variable from left to right, suggesting that the victim was, at that point, a moving target. N.T. 8/8/95, pp. 125-126.

The Commonwealth completely downplayed, by contrast, the very telling circumstances that (a) the only bullet recovered from a *frontal* wound was a .380 caliber bullet; (b) the two bullets recovered from two out of three of White's wounds *to the back* were 9 millimeter bullets; and (c) Petitioner's gun was a .380 weapon. *See* N.T. 8/8/95, pp. 96-97.[4] From these circumstances, Petitioner reasonably argued that he himself shot at White from the front – while cornered and believing that self-defense was needed – but that the wounds to the back, including the wound most fatal to White, were inflicted during the ensuing melee by Kevin White, gratuitously, and not by any request, conspiracy or combination with Petitioner.

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4. Lieutenant Stephan's testimony at N.T. 8/8/95, p. 96 established that the two bullets recovered from White's upper back were 9 millimeter Luger ammunition – clearly corresponding to the 4th and 8th wounds described by Dr. Mills at N.T. 8/8/95, pp. 119-121, 123-125. Similarly, Lieutenant Stephan testified that the bullet recovered from White's midline lower back was .380 automatic ammunition – clearly corresponding to the 7th wound described by Dr. Mills, which was the only other wound from which a bullet did not exit. N.T. 8/8/95, pp. 97, 123.

Despite the fact that the .380 caliber bullet could only have been recovered from the *frontal* wound, number 7, the prosecutor consistently and deceptively argued to the jury that this bullet was retrieved from a shot *in the back*. *See* N.T. 8/9/95, pp. 86-89, 106, 113-115. *See also* similarly deceptive cross-examination and trickery of Petitioner at N.T. 8/9/95, pp. 86-89. The fact remains, however, that the testimony of Dr. Mills, combined with the testimony of Lt. Stephan, clearly establishes that the two nine millimeter bullets were recovered from wounds to the back, and that the .380 bullet was recovered, lodged *in* the back as a result of a *frontal* gunshot. *Defense counsel did absolutely nothing to correct this error.*

In an attempt to discredit this self defense claim, the Commonwealth had Lt. Stephan give expert ballistics testimony to the effect that although the two different caliber bullets could just as easily have come from two different caliber guns, N.T. 8/8/95, pp. 105-106, *and although there were insufficient identifying characteristics to permit any conclusion about whether they did or not,* it was nevertheless *possible* that a single assailant loaded his .380 firearm with some .380 ammunition, followed by some less-well-fitting 9 millimeter ammunition, and then fired all eight rounds. N.T. 8/8/95, pp. 88-89, 94-95, 97-98, 103-105.

In support of this suggestion, the only "evidence" Lt. Stephan was able to offer was (a) the fact that he, on a single occasion, had successfully fired 9 millimeter ammunition from a single, cheaply made, California Rico .380 firearm, and (b) the fact that the two live 9 millimeter rounds found on the street in the vicinity of the shooting had deformities which *might* have been caused by being ejected from a weapon with a feed problem. N.T. 8/8/95, pp. 88-94, 104-105.

Nonetheless, based on this testimony, the Commonwealth urged the jury to dismiss Mr. Williams as nothing but a "phantom," created by Petitioner as an eleventh hour fabrication, and to convict Petitioner of premeditated, first degree murder on the theory that he fired all eight shots into White. *See* N.T. 8/9/95, pp. 116-117.

C. Offers of Proof and Testimony in the Pennsylvania Post Conviction Proceedings

Petitioner attached to his amended petition for relief under the Pennsylvania Post Conviction Relief Act (filed June 8, 2000), an affidavit from his brother Kurtis Rainey, who was, at the time, an officer with the Coatesville, Pennsylvania police department. In this affidavit, Officer Rainey stated under oath (a) that on the morning of November 19, 1994, Kevin Williams told him that he had shot the decedent, Kenneth White; (b) that Williams, at the time, had a 9 millimeter pistol; (c) that Petitioner, at the time, had a .380 firearm; and (d) that Petitioner, on that same morning, told a version of the events which was consistent with his testimony at trial. Officer Rainey's affidavit also confirmed that he had informed Petitioner's trial attorney of these facts, had indicated a willingness to testify on Petitioner's behalf, and was in fact present and available at the trial. *See also* testimony of Kurtis Rainey, 6/21/01, pp. 32-36 (Rainey was prepared to testify to Kevin Williams' statement and to his possession of a 9 millimeter gun on the morning of the killing; offered to help find Williams but was never asked; attended every day of the trial; was told by Mr. Greenberg that his testimony would be "prejudicial").

Counsel confirmed that he did know of Officer Rainey's potential testimony. He explained his failure to use that testimony (a) because he thought that its use would present a hearsay problem, since he had been unable to locate Kevin Williams himself; and (b) because he thought "the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." N.T. 6/21/01, pp. 6-7, 9-11.

Petitioner also attached to his PCRA petition expert evaluation proposals from firearms experts John H. Dillon, Jr., and B.L. Jennings, Inc. – which together indicated that a more thorough examination of the ballistics evidence should have been done on behalf of the defense, that only certain of the earlier manufactured Bryco pistols could be forced to fire 9 millimeter ammunition, and that with well over a million similar .380 pistols extant, the physical characteristics of the shells and bullets found at the scene or in Kenneth White's body could quite easily have been produced by two separate .380 firearms.

D. Additional Offer of Proof in Habeas Proceeding

In the District Court, Petitioner submitted an expert evaluation of Lt. Stephan's testimony from a well-qualified expert, Gerald R. Styers, which concluded that:

(a) A defense expert should have performed an independent examination of the ballistics evidence, including comparison of marks produced by the firing pin, breech face, extractor, ejector, chamber, magazine and slide scuff, since Lt. Stephan testified only about examining the firing pin impressions;

(b) Defense counsel, with the help of an expert ballistician for the defense, could and should have challenged the testimony of Lt. Stephan that the deformed nine millimeter live rounds found on the street were indicative of having been chambered into a .380 automatic firearm – because there were several other possible reasons for such deformity, including a faulty magazine, bad feed ramp or a dirty firearm;

(c) There was no scientific basis for the suggestion that the nine millimeter and .380 caliber bullets were fired from a single gun – rendering Lt. Stephan's testimony highly speculative;

(d) The jury should have been told in contradiction of the Commonwealth's argument that although it is not impossible to fire nine millimeter Luger cartridges in a .380 automatic pistol, it is highly unlikely; and

(e) If nine millimeter ammunition had been fired from a .380 automatic pistol, there should have been indications as to this fact on the *fired* 9mm Luger cartridge cases, indicating they were fired in a shortened chamber. Since Lt. Stephan testified only to the deformities on the *live* cartridges, but made no comment on the fired cartridge cases, competent counsel with the help of a defense expert ought to have had the *fired* cartridge cases examined, and/or should have pointed out to the jury Lt. Stephan's omission.

Report of Gerald R. Styers, Forensic Consultant, March 30, 2006, Exhibit O to Petitioner's Objections to the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, Filed in the District Court on April 5, 2006.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Below, In Direct And Serious Conflict With The Standards Set Forth In *Strickland v. Washington*, 466 U.S. 668 (1984), Applied An Erroneous, Sufficiency-Of-The-Evidence Standard When Evaluating The Prejudice Which Resulted From Trial Counsel's Ineffectiveness.

At issue in this habeas corpus proceeding, was whether Petitioner's trial counsel, by his ineffectiveness, so completely emasculated Petitioner's claim to have acted in self defense, that the reliability and fundamental fairness of the proceedings was destroyed – and whether Petitioner as a result was unconstitutionally convicted of premeditated murder and unjustly sentenced to spend his life in prison without possibility of parole. In support of this ineffectiveness claim, Petitioner raised, in the District Court, several related – and cumulatively very damaging – omissions by trial counsel:

> (1) that he failed to call Petitioner's brother to testify to the admissions made by Kevin Williams to having "finished" White off after he had first been shot by Petitioner, and to White's possession of a nine millimeter firearm at the time he made those admissions;
>
> (2) that he failed to object to the highly speculative expert testimony by Lieutenant Stephan, as he could have done under Pennsylvania law; and

> (3) that he failed to obtain and present an independent expert ballistics analysis for the defense.

In rejecting all three of these bases for the claim, the District Court effectively applied a sufficiency-of-the-evidence standard for judging prejudice, instead of the probabalistic analysis which has been required by this Court ever since its seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984).[5]

In *Strickland*, this Court described the standards applicable to the prejudice inquiry as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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5. The ineffectiveness issues were, of course, raised in the context of a habeas petition under 28 U.S.C. § 2254, and the District Court's holdings were therefore generated in the course of deciding whether or not the Pennsylvania Superior Court's rejection of the claim represents an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(2). Since the District Court failed to apply the proper standards for judging prejudice under *Strickland*, its analysis of the issue presented under § 2254(d) was likewise unsound. Similarly incorrect, therefore, also, was the Third Circuit's conclusion that Petitioner had "failed to make a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). On the contrary, as set forth more fully in the text of Parts I and II herein, Petitioner has made out a very substantial case of attorney ineffectiveness and has demonstrated that the Superior Court's holding to the contrary constitutes an unreasonable application of the *Strickland* standards.

> A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S. at 695-696. Significantly, this Court in *Strickland* specifically considered *and rejected* the position advanced by the Florida respondents, which would have required defendants making ineffectiveness claims to shoulder the much higher burden of proving that counsel's deficient conduct "more likely than not" altered the outcome of the case. This Court, however, rejected that suggestion in favor of the "reasonably likely" standard.

The District Court in this case, however, went even further afield from the proper standard under *Strickland* – and effectively applied a sufficiency-of-the-evidence standard. Although the Court did recite the proper standard at certain points in its opinion – *see, e.g.*, Appendix, 12a, 16a – the Court went on to simply disregard that standard and to reject Petitioner's prejudice claims on grounds that the jury still *might have* or *could have* convicted Petitioner, even if counsel had supplied the omitted evidence and made the omitted objections. *See* Appendix 17a ("Even if Kurtis Rainey had been allowed to bolster the second gunman theory through his own testimony, the jury *might have* rejected his account based upon the conflicting testimony of Boyd" – emphasis supplied); 17a. ("the undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that '[t]he cause of death was multiple gunshot wounds to the chest and the abdomen and the back," *could have* led the jury to conclude that Petitioner committed first degree murder' " – emphasis supplied); 22a ("we have already found that the Superior Court was not unreasonable in deciding that

even if Petitioner had conclusively established the existence of a second shooter, such evidence *might not have influenced* the outcome of the trial"– emphasis supplied).

Although this serious error was pointed out by Petitioner in his application for a certificate of appealability in the Third Circuit, that Court not only failed to correct the District Court's error, but in fact specifically adopted the District Court's reasoning. Appendix, 1a. In effect, therefore, the Third Circuit has sanctioned the application, to Petitioner's case, of a standard at odds with this Court's holding in *Strickland.*

Issuance of a writ of certiorari is appropriate and necessary for a number of reasons. First of all, of course, the Courts below have sanctioned the application of a much stricter standard to the prejudice prong of an ineffectiveness analysis, than the standard mandated by this Court. This failure to abide by *Strickland* clearly requires this Court's supervisory correction. Petitioner had the right to have his habeas petition decided in accordance with the standards set down by this Honorable Court, and not by any more difficult standard.

Secondly, the application of an incorrect standard by the federal courts below has continued the very palpable denial of justice that took place in the Pennsylvania court system. The physical evidence, under any rational analysis, demonstrated that two separate guns were most likely used in the assault against the victim. The injuries most likely to have actually caused

death – and the injuries that were consistent with firing at an already-subdued, prone victim – were caused by 9 millimeter gunshot wounds to the back, whereas the less damaging wounds were inflicted by a different caliber firearm from the victim's front. There was no evidence in the record whatsoever to indicate a conspiracy, or concerted action of any kind, between Petitioner and anyone else. All witnesses, *including the Commonwealth's*, agreed that it was the victim who relentlessly pursued Petitioner as he was attempting to walk away from the argument, that the victim was accompanied by at least one and maybe more friends, and that the victim had a reputation for being armed. Petitioner testified that he did indeed fire some shots, in the belief that they were required for his self-defense, from his .380 caliber weapon – and that he was horrified when subsequently, one of his "friends" proceeded to do him the non-favor of finishing off the victim while he lay prone upon the ground.

Had Kurtis Rainey's testimony been used, the jurors would have had before them Williams' confession to having fired the particular shots to the back which most clearly spelled first degree murder in this case. They would have had Officer Rainey's observation that Williams did in fact have a nine millimeter firearm. They would also have had a reason to reject the Commonwealth's suggestion that Mr. Williams was a non-existent phantom, recently fabricated by Petitioner for purposes of the trial. *See* Part II below.

Similarly, had the defense obtained a ballistics expert, the jurors would *at worst* have had before them the testimony of an expert other than Lt. Stephan,

pointing out the huge unlikelihood of the single gunman theory, as well as the deficiencies of his scientific methodology and the speculative nature of Lt. Stephan's testimony. At best, with the assistance of a countervailing defense expert report, counsel might have kept out Lt. Stephan's testimony entirely, *see* Part II below, thus depriving the Commonwealth of *any* underpinnings for its single-gunman theory, and leaving Petitioner's testimony about self defense (whether justifiable or mistaken belief, no matter) effectively unopposed, and also unambiguously corroborated by the physical evidence.

The Superior Court, the District Court, and ultimately the Third Circuit Court of Appeals, have all adopted a position that is simply not supportable in any way shape or form upon the record of the trial in this case – that is, that trial counsel's failure to challenge the single-gunman theory with available, countervailing *evidence*, as opposed to mere *argument*, was harmless. As will be further argued in Part II below, the Superior Court's original holding to this effect was predicated upon very obvious mis-statements of the record and should have entitled Petitioner to habeas relief under 28 U.S.C. §§ 2254(d)(2) and (e)(1).

What is important for the *instant* argument, however, is that District Court, with the Court of Appeals' imprimatur, repeatedly analyzed and rejected Petitioner's ineffectiveness claims because the outcome of the proceedings *could possibly* have remained the same, even if counsel had not committed the errors complained of – in other words, because there would still have been *sufficient* evidence to convict. Had the District

Court applied the correct *Strickland* analysis, however, the inquiry would have been very different: whether there is a *reasonable probability* that outcome of the proceeding would have been different.

Furthermore, the easy substitution of a sufficiency evaluation for the evaluation mandated by *Strickland* could potential affect thousands of litigants unless the error is promptly corrected. It is, therefore, a matter of gravest importance that this Honorable Court grant certiorari to address the false equivalency set up in the Courts below between the "reasonable probability" standard of *Strickland* on the one hand and the sufficiency of the evidence to convict on the other.

II. The Courts Below Abdicated Their Responsibility To Remedy The Superior Court Of Pennsylvania's Clearly Unreasonable Misapplication Of *Strickland v. Washington*, 466 U.S. 668 (1984) – As Well Its Clearly Erroneous Factual Determinations Which Were Directly Contrary To The Evidence Of Record – In A Case In Which Petitioner's Claim To Have Acted In Self Defense Was Totally Emasculated By Trial Counsel's Ineffectiveness.

The ineffectiveness issues mentioned above were, of course, raised in the context of a habeas petition under 28 U.S.C. § 2254, and the District Court's holdings were therefore generated in the course of deciding whether or not the Pennsylvania Superior Court's rejection of the claim represents an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d)(2). Since the District Court failed to apply the proper standards for judging prejudice under *Strickland*, its analysis of the issue

presented under § 2254(d) was likewise unsound. Similarly incorrect, therefore, also, was the Third Circuit's conclusion that Petitioner had "failed to make a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2).

As previously argued, the District Court evaluated the prejudice prong of the ineffectiveness analysis while using the wrong standard. It also deferred to state court adjudications that simply were not entitled to any deference. The Superior Court, for example, rationalized counsel's failure to use Officer Kurtis Rainey's testimony, based on counsel's testimony that (1) he could not locate Kevin Williams and thought that his admissions to Kurtis Rainey would be excludable on hearsay grounds, and (2) he thought "that the bias of Kurtis Rainey would be harmful to his brother Karl given the fact that they were brothers." Appendix, 48a-49a; N.T. 6/21/01, pp. 6-7. The first belief, however, was clearly wrong under established Pennsylvania law. *See Commonwealth v. Young*, 561 Pa. 34, 55, 748 A.2d 166, 176-177 (1999) (hearsay exception for admissions against penal interest); *Commonwealth v. Statum*, 769 A.2d 476, 479 (Pa.Super. 2001) (counsel ineffective for failing to present declaration against penal interest by person other than defendant). The second belief, moreover, was totally illogical given that *Petitioner* was allowed to testify to the very same facts – but was left without corroboration of any kind at all – a pattern not of strategic choice but neglect! Indeed, if counsel were free to disregard important evidence willy nilly merely because the witness had some bond of friendship or relationship by the defendant, one wonders how there could ever be proof of alibi defenses or character testimony – much less how state prosecutors

could manage to prove their cases which depend so often upon an informing "friend" or relation.

Furthermore, the evidence ignored by Petitioner's trial counsel was extremely important to establishing Petitioner's defense. *Compare, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973), in which this Court held that even a state's otherwise valid rule excluding hearsay could not, constitutionally, be invoked to prevent a defendant from putting on evidence of a third party's confession to having committed the offense for which Petitioner was charged.

The District Court, however – despite these gaping holes in the rationales advanced by counsel – deferred to the Superior Court's unreasonable reasoning without undertaking any evaluation whatsoever of the underlying analysis. Appendix, 15a-16a, n.2.

Similarly unreasonable was the Superior Court and District Court's reasoning regarding counsel's failure to object to – or provide countervailing expert testimony to – Lt. Stephan's highly conjectural single-gunman theory, which he advanced from no more scientific a basis than his own experience firing a single gun! N.T. 8/8/95, p. 104. There was, moreover, not one iota of evidence in the record to indicate that Petitioner's gun was of the same "cheap" California make as the gun Lt. Stephan had test-fired in this way. N.T. 8/8/95, p. 105. The admission of this testimony, therefore, definitely fell afoul of Pennsylvania's clearly stated evidentiary prohibition against the admission of expert testimony which is based upon "conjecture or guesswork." *See Commonwealth v. Petrovich*, 538 Pa. 369, 372, 648

A.2d 771, 774 (1994). Counsel, however, failed to lodge any objection whatsoever to the conjectural foundation of the expert's premise.

Similarly, a long line of Pennsylvania cases had by the time of Petitioner's trial held that prior to admitting expert testimony in a particular area of expertise, it was necessary first to determine "that the subject about which the expert would testify has been sufficiently established to have gained general acceptance in the particular field in which it belongs." *See, e.g., Commonwealth v. Dunkle*, 529 Pa. 168, 173, 602 A.2d 830, 832 (1992). Again, however, counsel failed to challenge Lt. Stephan's methodology of making sweeping generalizations based upon a single test fire, and his basis for concluding that the live 9 millimeter rounds were deformed because of being jammed, supposedly, into a .380 caliber firearm.

Additionally, counsel failed to take any steps to counteract Lt. Stephan's testimony, once it was received. As is apparent from Petitioner's offers of proof in the PCRA and District Courts, expert testimony would have been readily available and helpful both in cross examination and in the defense case in chief, had counsel bothered to seek it out. Indeed, had a defense expert report been offered in *advance* of trial, a compelling case could have been made for the exclusion of Lt. Stephan's testimony *in toto!*

The Superior Court, however, in its September 9, 2004 Memorandum, defers to counsel's testimony at the PCRA hearing that

> he believed the ballistics testimony carried no weight, and because no gun or guns were ever recovered, it was not possible to positively compare the bullets retrieved from the victims to any gun. In counsel's opinion, it was in Appellant's best interests not to challenge this testimony so as not to re-emphasize it to the jury, and instead he chose to address it in his closing argument where he could point out its lack of significance.

Appendix, p. 50a. Respectfully, Superior Court failed to reasonably apply *Strickland* when it rubber-stamped counsel's clearly irrational strategy. Nowhere does the Superior Court explain why allowing objectionable testimony in and then arguing against it in closing argument could *possibly* be preferred as a matter of defense strategy to not allowing the objectionable testimony in, in the first place. Nor does the Superior Court explain why it was rational for trial counsel to worry about *"re-emphasizing"* the single gunman theory when the Commonwealth had already indicated in its opening argument the prominence it was going to give to that theory. N.T. 8/7/95, pp. 30, 32. *See also*, extensive closing argument on the point at N.T. 8/9/95, pp. 106-107, 111-112, 116, 119-120. Accordingly, it was error for the District Court to have afforded any deference to the Superior Court's opinion, in the face of such unreasonable conclusions of fact on the record, and in the face of such an unreasonable application of

Strickland. A certificate of appealability should, therefore, have been granted to correct the error of the District Court.

The District Court's application of the prejudice prong of the *Strickland* analysis was similarly in error. In addition to applying the wrong standard under *Strickland*, the District Court concluded that Petitioner was not prejudiced by any of counsel's omissions, *based upon findings of fact which were wrong and unwarranted upon the record back when the Superior Court first advanced them, and which are just as wrong and unwarranted upon the record now in the instant habeas proceedings.*

With respect to the failure to call Kurtis Rainey, for example, the Superior Court stated that

> [i]n light of Appellant's admission at trial that he intended to shoot the victims, and the evidence that the cause of death was the result of multiple gunshot wounds and not any one isolated wound; the introduction of testimony by Appellant's brother which referenced a second gunman would not have exonerated Appellant.

Appendix, 48a-49a. This conclusion is echoed in the District Court's reference to the supposedly "undisputed fact that Petitioner shot an unarmed man at least two times and the testimony of Dr. Mills that 'the cause of death was multiple gunshot wounds to the chest and the abdomen and the back.' " Appendix, p. 17a.

Both factual premises in the Superior and District Court's opinions are inaccurate as stated. While Dr. Mills did testify in summary fashion that the cause of death was "multiple gunshot wounds" – her precise testimony as to each of the eight wounds suffered by White made it perfectly clear that the wound most likely to have caused White's death was the "eighth" wound – which was one of the wounds inflicted upon White with a nine millimeter gun while White was on the ground, already injured. In other words, Dr. Mills' testimony clearly supported the inference that was being advanced by *the defense*, which was, that Kevin Williams fired the fatal shot. Thus, whatever the jury *could have* concluded, the *probable* conclusion based on Dr. Mills' testimony and the locations of the various bullets found in the body, was that, just like Petitioner testified, somebody else with a nine millimeter gun was responsible for killing White. The only reason that probable result was aborted was the unchallenged and insupportable expert opinion of Lt. Stephan.

Nor is it an accurate statement, without qualification, that Petitioner "shot an unarmed man at least two times," or that he "intended to shoot the victim." The correct statement is that Petitioner admitted that he intended to shoot the victim *in self defense and in reasonable fear for his life*, given Mr. Boyd's and Mr. White's reputations for violence, carrying guns and shooting people, N.T. 8/9/95, pp. 25-29, 46-47, 52, given that he had been specifically warned to watch his back with White for that reason, N.T. 8/9/95, p. 52, given the fact that White was *pursuing* Petitioner and continuing the difficulty while Petitioner in fact was attempting to walk away, N.T. 8/7/85, pp. 90-94, 114-115 (Boyd); 8/8/95, pp. 7-10, 18 (White);

8/9/95, pp. 335-39, 45-56 (Stanton), 55-59 (Petitioner), and given the fact that Petitioner was being restrained from leaving by White and his associates, who had surrounded him. N.T. 8/8/95, pp. 17-19; 8/9/95, pp. 38-39, 45-46. Petitioner's claim that he believed himself in danger, and that White appeared to be reaching for a gun, was, furthermore, *not* especially disproved even by Boyd himself, who was unable to see what if anything White was doing with his hands, that might have alarmed Petitioner. N.T. 8/7/95, p. 125. Accordingly, there was significant corroboration of Petitioner's statement that he intended to *defend himself* and fired shots at White for that purpose alone.

In light of all the above, and given the previously described weaknesses in the eyewitness testimony from Boyd and Kevin White, it was objectively unreasonable for the District Court and the Superior Court to conclude *on this record* that Lt. Stephan's testimony was insignificant, and that it would not have dramatically aided the defense to point out the unlikelihood of the single-gunman theory, the glaring omissions in Lt. Stephan's science and methodology – as well as the existence of a witness to Kevin Williams' confession, the caliber of the guns carried by Williams and Petitioner, and the fact that Petitioner had been claiming self-defense ever since the very morning of the shooting.

In sum, the Superior Court's objectively unreasonable factual determinations have led to an objectively unreasonable application of *Strickland* on this record. The District Court erred in not so holding, and the Court of Appeals erred in not issuing a certificate of appealability.

CONCLUSION

For all of the foregoing reasons, therefore, Petitioner respectfully requests that this Court grant a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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